

# Pseudo-Legal Justice

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On the morning of his thirtieth birthday, Josef K., a member of the Council of the Anti-corruption Agency of Montenegro, was [dismissed](#) of his duties, by the very same body that appointed him: the Parliament of Montenegro. This could be the first sentence of a novel written by Franz Kafka if he was with us today. While Kafka's Josef K. was arrested and left to roam free through a court building to find a courtroom in which his destiny would be determined, Josef K. in this story is in a similarly peculiar situation: He does not know which court in Montenegro he should appeal to and present his grievances. This Kafkaesque reality is the result of a questionable interpretation of the law by Montenegro's Supreme Court – just another piece in the demise of the country's rule of law.

In the course of one year, the Parliament of Montenegro managed to dismiss [Vanja #alovi#](#) (member of the Council of the Anti-corruption Agency of Montenegro), [Goran #urovi#](#) (member of the Council of the National Broadcasting Company of Montenegro), [Irena Radovi#](#) (Vice Governor of Central Bank of Montenegro) and [Nikola Vuk#evi#](#) (member of the Council of the National Broadcasting Company of Montenegro) of their duties. All these people now find themselves in the situation of our protagonist, Josef K.

One might probably wonder: Wouldn't it be natural that an Administrative Court of sorts would have jurisdiction since our protagonist was appointed in an administrative procedure, by one of the three main branches of government? According to Article 82(1(14)) of the [Constitution](#), the Parliament of Montenegro has the authority to appoint and dismiss from duty members of various governmental bodies, including members in the councils overseeing those bodies. In its [recently published](#) legal position of principle, the Supreme Court of Montenegro announced that regular administrative courts do not have jurisdiction over such matters. The Supreme Court does not explicitly rule whether such cases fall within the jurisdiction of the Constitutional Court, but the Supreme Court President in her public appearance indicated that this is a matter of constitutional law.

The Constitutional Court, however, has already dismissed one of three cases with an identical or similar background that are being heard before regular courts in Montenegro. It held that the Constitutional Court is only competent to hear such cases when all legal remedies have been exhausted, thus the applicant must wait for the outcome before the regular courts ([U-III 225/18](#)). In addition, the President of the Constitutional Court, Dragoljub Draškovi#, published a [paper](#), in which he explicitly stated that disputes with regards to personal appointments and dismissals by the Parliament do not fall within the jurisdiction of the Constitutional Court. This is rightfully so, as Article 149 (7) of the [Constitution](#) only refers to electoral disputes and disputes related to referendums. Here, I must clarify that in the Serbo-Croatian language family, the noun used for 'election' and 'appointment' is the same: "izbor". However, from a reading of this paragraph, it is clear that it refers to the domain of

elections and it is peculiar how so many judges in the Supreme Court appear to have missed this.

## **An unsolicited opinion**

A legal position of principle is, in general, non-binding on lower courts. However, according to Montenegrin legal jurisprudence, if a judge of a lower court refuses to apply it or opposes its application, the judge must support such difference with valid argumentation and justification, otherwise there is a grave risk of the judgment being revoked. The aim of adopting legal positions of principle and legal opinions of principle in Montenegrin jurisprudence is to harmonize courts' practice. This practice thus helps to secure the rule of law by providing legal certainty and clarity as well as equality before the law and does not only refer to the jurisdiction of Supreme Court. Delivering such legal positions of principles in order to define legal principles and standards on both vertical and horizontal levels throughout the judicial system is one of the Supreme Court's core purposes beyond its adjudicating role. In doing so, it relies not only on the constitution and laws, but also on international standards and international law and jurisprudence. According to Articles 25 and 26 of the Law on Courts, a legal position of principle is usually delivered on the Supreme Court's own initiative or upon the request of the lower courts in times when disparate practice of lower courts in similar cases is obvious.

So how did we come to this impasse? I will refrain from elaborating on this idiosyncratic situation, in which, contrary to the Constitution, the President of the Supreme Court received her [third mandate](#). It is peculiar that this legal position of principle was adopted in the midst of four cases of unlawful dismissals of people appointed in various institutions. These [cases](#) have also gained media [attention](#), as well as favorable judgments before regular courts, which shows that there were no disparate practices occurring.

The reason for harmonization came from the interpretation of the Law on Administrative Procedures, which in its Article 13 states that the Administrative Court does not have jurisdiction in matters where jurisdiction is conferred to other courts, or in matters related to the decisions of Parliament or the President of Montenegro. Article 14 of the Law on Courts [defines](#) the jurisdiction of basic courts and states that basic courts always have jurisdiction to adjudicate in first instance on other matters, unless the law prescribes the jurisdiction of another court. Thus, the Supreme Court's opinion is an outcome of a literal interpretation of these provisions. Instead, a systematic and teleological interpretation would have taken into consideration the purpose of administrative procedures, which is to secure judicial control over administrative state bodies and governments. The Administrative Court adjudicates on the legality and lawfulness of administrative acts, and not of any human rights violation without examining any potential fundamental or human rights violations. *Ergo*, the Constitutional Court is not the primary address for such disputes.

## Denying the right to have rights

In this manner, the highest-ranking judges in Montenegro have contributed to the creation of pseudo-legal justice, where legal norms appear as imperative, come what may. Our hero, Josef K., is in a judicial penumbra created by the legal system, in which his basic right to access the courts as well as principles of equality before the law are violated. Where any other government employee can seek for justice before the regular courts in Montenegro, those appointed by the Parliament may only do so before the Constitutional Court, under the premise that human rights violations have occurred. The right to access courts and equality before the law are cut from the same cloth which means that the former encompasses not only criminal or civil proceedings, but all proceedings in which a party suffered some harmful consequences. The Supreme Court is not fulfilling its role that is immanent to the judicial branch in any democratic society: to define the division of powers and adjust a system of checks and balances between branches of government (Parliament vs. Government). By doing so, it allows the state to not respect the rights that are owed to persons and thus it fails to protect citizens from unfair treatment attributable to governmental actions.

According to the European Court of Human Rights (ECtHR), *vis-à-vis* the European Convention on Human Rights (ECHR), a right to access courts also includes a right to be able to place one's case effectively before a court (see para. 24 in [Airey v. Ireland](#), 6289/73). ECtHR jurisprudence confirms that disputes concerning public servants fall within the scope of Article 6 of the ECHR, and this includes all disputes, notwithstanding the special nature of the relationship between the particular civil servant and the State in question. I quote this in case someone would argue that being appointed by Parliaments creates certain special bonds between the appointee and the government. It does not. (see para. 50-62 in [Vilho Eskelinen and Others v. Finland](#), 63235/00)

At the same time, the ECtHR has developed a two-prong test (*Vilho Eskelinen test*) according to which it will be "for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified" (para. 62). Thus, the legal position of principle in question is inconsistent with the Constitution, as well as with the ECHR and ECtHR jurisprudence because it prevents Josef K.'s access to justice. By denying the regular courts' jurisdiction to adjudicate in administrative matters, the Supreme Court implicates itself in allowing unlawful decisions to be made, having a cascading effect that contributes to the demise of the rule of law.

I dare to pose one last and final observation. According to [Hannah Arendt](#), every individual possesses sovereignty in a democratic state, and since all individuals should be equal they share that sovereignty to prevent one group from dominating another. In such circumstances, she emphasizes the particularity of the human being as a member of a political community, which is a right in itself. Ultimately, Arendt claims that above and before everything, we have a right to have rights. Linguistically observed, a right (*ius*, *droit*, *diritto*) indicates the idea of some positive law where

a law (*lex, loi, legge*) is seen as a broad, institutionally established norm. Now I wonder, if the Supreme Court judges, by interpreting certain laws and consequently negating certain rights, truly believe that they provide for the harmonization of practices and a respect for the rule of law. I only recognize that ultimately, the Josefs of Montenegro have been denied their fundamental rights, oppressed upon by a judiciary that is supposed to uphold equal protection under the law.

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